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No. _____

In The

Supreme Court of the United States

CITY OF TAMPA, FLORIDA,

Petitioner,

v.

VOYEUR DORM, L.C., ENTERTAINMENT NETWORK, INC., AUTUMN DAWN MARENGER AND 2D&H, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the well established case law of the United States Supreme Court – which allows municipalities to keep adult entertainment establishments out of residential neighborhoods – is applicable to the staging and filming of adult entertainment on a residential premises where the adult entertainment is commercially transmitted over the internet to paying subscribers who may view the adult entertainment without physically attending the residential premises wherein the adult entertainment is being staged and filmed; and where there is evidence in the record of adverse secondary effects in the residential neighborhood from the adult entertainment being staged and filmed at the residential premises.

2. Whether a municipality's definition of an adult entertainment establishment, which does not expressly require that patrons view the adult entertainment from the location where the adult entertainment is being performed, may be judicially interpreted to impose a requirement that patrons view the adult entertainment from the location where the adult entertainment is being staged and filmed.

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit that gives rise to this Petition, which was filed on September 21, 2001, is reproduced at Appendix A to this Petition. It is reported at 265 F.3d 1232 (11th Cir. 2001).

The Order denying the City's Petition for Rehearing En Banc, which was filed on November 15, 2001, is reproduced at Appendix C to this Petition.

The Order of the District Court granting the City's Motion for Final Summary Judgment, which was filed on November 6, 2000, is reproduced at Appendix B to this Petition. It is reported at 121 F.Supp.2d 1373 (M.D. Fla. 2000).

JURISDICTION

On November 6, 2000 the United States District Court for the Middle District of Florida entered an Order granting the Motion of the City of Tampa ("City") for Final Summary Judgment.

On September 21, 2001 the United States Court of Appeals for the Eleventh Circuit issued its decision reversing the District Court's Order granting final summary judgment in favor of the City.

On October 9, 2001 the City filed a Petition for Rehearing En Banc with the Eleventh Circuit which was denied on November 15, 2001.

The within Petition for Writ of Certiorari is timely filed within 90 days of the date of the denial of the Petition for Rehearing En Banc in accordance with Rule 13.3 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant provisions from § 27-523 of the Tampa City Code, including the definitions of "Adult Entertainment Establishment," "Specified Anatomical Areas," and "Specified Sexual Activities," are set forth below.

> *Adult entertainment establishment:* Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as

defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances, either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals or pubic region;

b. Buttocks;

c. Female breasts below a point immediately above the top of the areola;

(2) Human male genitals in a discernably turgid state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy, whether actual or simulated;

(3) Fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.

STATEMENT OF THE CASE

On January 29, 1999 Plaintiffs' counsel, Mark Dolan, sent a letter to the City's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 Farwell Drive, Tampa, Florida ("the premises").

On February 12, 1999 the City's Zoning Coordinator, Gloria Moreda, responded to the aforesaid letter and stated in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premise.
> 2. 30 internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower, & kitchen.
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
> 4. The web page address is http://www.voyeurdorm.com/
> 5. The web page shows various scenes from the house, including a woman with an exposed buttocks. Statements on the page describe activities that can be viewed such as 'The Girls, of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion'.
>
> The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The

name of the web site is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as 'A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point'.

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as:

> Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

> Please be aware that the property is zoned RS-60 Residential Single Family and an adult use business is not a permitted use. You should advise your client to cease operation at that location.

Thereafter, on or about April 12, 1999, Dan and Sharon Gold Marshlack appealed the Zoning Coordinator's decision to the City's Variance Review Board and on or about July 13, 1999 the Variance Review Board voted unanimously to uphold the Zoning Coordinator's determination in this matter that the use occurring at the premises is an adult use.

Thereafter, on or about July 18, 1999, Dan and Sharon Gold Marshlack filed an appeal from the decision of the Variance Review Board to the City Council; and, on or about August 26, 1999, an appellate hearing was held before Tampa City Council in this matter. At that hearing, Dan and Sharon Gold Marshlack were once again represented by attorney Mark Dolan. Plaintiffs' counsel did not dispute, at the hearing, that there is a fee charged for viewing the women of the Voyeur Dorm; that the women are in fact disrobed; that they are part of a business enterprise; that Plaintiffs' counsel had requested an occupational license; and that these women were being paid. At the conclusion of the hearing, City Council voted unanimously to affirm the decision of the Variance Review Board which had upheld the determination of the Zoning Coordinator.

Thereafter, on or about September 24, 1999, the within action was filed by Plaintiffs Voyeur Dorm, L.C., Entertainment Network, Inc., Autumn Dawn Marenger,

and Dan and Sharon Gold Marshlack ("the Plaintiffs")[1] in the United States District Court for the Middle District of Florida.

During the course of discovery, it was established that approximately 25 to 30 different women have been employed at the premises; and that the women employed at the premises have appeared on the internet based web site voyeurdorm.com which is transmitted to subscribers 24 hours a day, seven days a week.

During the course of discovery it was further established that Plaintiff Autumn Marenger, and other women employed at the premises, entered into an Employment Agreement[2] with Plaintiff Voyeur Dorm, L.C. which provides, *inter alia*, that:

> (a) In consideration of employee allowing Voyeur Dorm to commercially photograph and broadcast the images and likeness of employee, live over the internet 24 hours a day, 7 days a week, Voyeur Dorm agreed to provide benefits to employee, as set forth in the Agreement, including providing compensation to employee and allowing employee to occupy and use a furnished bedroom and all common areas at the premises. (See App. 32; and paragraphs 2,

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[1] Subsequent to the filing of the lawsuit, 2 D&H, Inc. was substituted as a party Plaintiff for Dan and Sharon Gold Marshlack.

[2] A copy of the Employment Agreement is reproduced at Appendix D.

11 and 21 of the Employment Agreement reproduced at Appendix "D".)

(b) Employee acknowledged that the premises are, in addition to being the residence of employee, a stage and filming location for commercial internet broadcasting of the day to day activities of employee and other fellow employees 24 hours per day, 7 days a week. (See paragraph 9 of the Employment Agreement reproduced at Appendix "D".)

(c) Employee was prohibited from altering, moving or in any way interfering with the location or operation of the cameras at the premises. (See paragraph 10A of the Employment Agreement reproduced at Appendix "D".)

(d) Employee agreed to devote 8 hours per day, 6 days per week, to on-camera activities including, but not limited to, chatting, tanning, swimming, dressing, theme parties, special events, personal grooming and ablutions.[3] (See paragraph 22 of the Employment Agreement reproduced at Appendix "D".)

(e) Employee acknowledged that she had no reasonable expectation of privacy while on the premises and agreed to having her

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[3] The word "ablution" is defined by *Webster's Collegiate Dictionary*, Tenth Edition, to mean "the washing of one's body or part of it;" and "the act or action of bathing." The employees that were deposed also testified that they understood the word "ablution" to mean bathing or showering.

images and likeness commercially broadcast by Voyeur Dorm live over the internet 24 hours a day, seven days a week. (See paragraph 27 of the Employment Agreement reproduced at Appendix "D".)

(f) Employee agreed that she was not a tenant and waived any rights that she may have as a residential tenant. (See paragraph 28 of the Employment Agreement reproduced at Appendix "D".)

(g) Employee agreed that she could be terminated at will whereupon she would be required to immediately remove her personal property and leave the premises. (See paragraph 1 of the Employment Agreement reproduced at Appendix "D".)

During the course of discovery it was also established that the women employed at the premises, while performing their job responsibilities and appearing on voyeurdorm.com, displayed their specified anatomical areas including their uncovered breasts, uncovered buttocks and/or uncovered pubic region to the cameras; and those activities were intended to be displayed to the subscribers of voyeurdorm.com. Indeed, during the course of performing numerous activities that were required to be performed on camera pursuant to the Employment Agreement – including showering, swimming, tanning, changing clothes, chatting with subscribers and participating in theme parties and special events – the women employed at the premises exposed their uncovered breasts, uncovered buttocks and/or

uncovered pubic region to the cameras and those activities were intended to be displayed to the subscribers of voyeurdorm.com.

During the course of discovery, it was further established that some of the women employed at the premises also engaged in specified sexual activities at the premises and those specified sexual activities were displayed to the subscribers. In that regard, the discovery reflected that some of the women employed at the premises engaged in masturbation at the premises on camera and that said activity of masturbation was intended to be displayed to the subscribers of voyeurdorm.com; and that some of the women employed at the premises also engaged in oral sex at the premises on camera and that said activity of oral sex was displayed on voyeurdorm.com.

The discovery further revealed that the women employed at the premises are compensated for their services and receive a salary of approximately $400-$700 per week, plus occasional bonuses, plus free room and board, plus health insurance, plus dental insurance and free local phone service; that the subscribers to voyeurdorm.com pay a subscription fee of $34.95 a month to watch the women employed at the premises and subscribers pay a further fee of $16.00 per month if they wish to chat with the women employed at the premises; and that Voyeur Dorm generated subscriptions and sales in the amount of $3,166,551.35 from August, 1998 to June, 2001.

Finally, discovery further revealed that there were at least some individuals that physically visited the premises that had access to the voyeurdorm.com web site. In

that regard, the deposition testimony of Plaintiffs' employees reflects that one or more friends of the employees, who either paid a membership fee or were given a borrowed password, visited the premises. In addition, media representatives that visited the premises were given passwords to voyeurdorm.com.

On November 6, 2000 the District Court entered an Order granting the City's Motion for Final Summary Judgment. In reaching that conclusion the District Court found, in examining the undisputed facts and in applying the applicable law, that the City Code does not permit adult uses in residential districts; that the activities occurring at the premises constitute an adult use; that there is no language under the City Code that expressly states a requirement that the members of the public paying consideration be on the premises to view the adult entertainment from the location where the adult entertainment is being staged and filmed; that the Court must apply the plain and unambiguous language of the City Code and may not read language into the City Code which does not appear on the face of the City Code; that, as a matter of zoning law, the City is entitled to protect and improve the quality of its residential neighborhoods; and that, under well established law, it is not necessary for the City to demonstrate that it had experienced actual adverse secondary effects from the adult use activities at the premises.

On September 21, 2001 the Eleventh Circuit reversed the District Court's Order granting Final Summary Judgment in favor of the City. In reaching that conclusion the Eleventh Circuit found that, because members of the public did not physically attend the premises where the

adult entertainment was being staged and filmed, the premises did not fall within the purview of Tampa's zoning ordinance; that the case law relied upon by the City and the District Court concerned adult entertainment in which customers physically attend the premises wherein the entertainment is performed; and that the District Court misapplied the Tampa City Code because it erroneously found that the Voyeur Dorm offered adult entertainment to the public at the premises.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT WHICH HOLD THAT A MUNICIPALITY MAY KEEP ADULT ENTERTAINMENT ESTABLISHMENTS OUT OF RESIDENTIAL NEIGHBORHOODS.

The law is well established that municipalities may regulate the location of adult uses and, indeed, the Supreme Court has upheld zoning ordinances prohibiting adult businesses in residential neighborhoods. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Supreme Court upheld city's zoning ordinance, which prohibited adult uses from locating within 1,000 feet of residentially zoned property, and found that the city's interest in attempting to preserve the quality of urban life must be accorded high respect); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (Supreme Court upheld validity of zoning ordinance, prohibiting the operation of an adult establishment within 500 feet of a residential area, and found that the city's interest in attempting to

preserve the quality of its neighborhoods must be accorded high respect).

The law is also well established that a municipality need not even conduct new studies on a case by case basis to demonstrate the problem of secondary effects associated with an adult entertainment establishment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Supreme Court expressly held that:

> [T]he city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects . . . And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. *See Renton v. Playtime Theatres, Inc., supra* at 51-52, 106 S.Ct. 925 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

529 U.S. at 296-297.[4]

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[4] In the case *sub judice*, the City – consistent with the Supreme Court's decision in *Pap's* – reasonably relied on the evidentiary foundation set forth in *American Mini Theatres*. Indeed, in *Specialty Malls of Tampa v. City of Tampa*, 916 F.Supp. 1222, 1230 (M.D. Fla. 1996), *aff'd*, 109 F.3d 770 (11th Cir. 1997), the district court specifically identified the Supreme Court decision in *American Mini Theatres*, and Detroit's adult use ordinance which was the subject of the *American Mini Theatres* case, as being two of the seven predicate documents upon which the City of Tampa relied to establish secondary effects caused by adult uses. These documents, moreover, were filed in support of

It should further be noted that in *Pap's* that the Court expressly stated that "the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government." 529 U.S. at 300 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000)). The Supreme Court, moreover, expressly rejected Justice Souter's partial dissent which would have required an empirical analysis to determine whether the threatened harm was real. Indeed, the Supreme Court stated:

> Justice SOUTER next hypothesizes that . . . since the question whether these secondary effects occur is 'amenable to empirical treatment,' we should . . . require such an empirical analysis. . . . In *Nixon*, however, *we flatly rejected that idea.*

529 U.S. at 300 (emphasis supplied).

Finally, in *Pap's*, the Court made clear that "the government should have sufficient leeway to justify . . . a law based on secondary effects." *Id.* at 298 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).[5]

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the City's Motion for Final Summary Judgment in the case *sub judice*. Finally, the District Court's Order of November 6, 2000 also found that the "City Code is based upon a proper predicate and is justified based on secondary effects. . . . " (See App. 27.)

[5] As the Court pointed out in *Pap's*, the *O'Brien* decision "did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards." 529 U.S. at 298. *See also Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993) where the Supreme Court held that "a legislative choice is not subject to courtroom fact-finding and

The aforesaid case law is clearly binding and applicable in the case *sub judice*. Indeed, some of the adverse secondary effects which are associated with adult entertainment businesses in residential neighborhoods may be found in the record below which reflects, *inter alia*, the following: that there were complaints by neighbors concerning the activities at the premises; that there were concerns expressed by residents to a detective about parking, traffic and noise; that a former employee complained to the effect that the women at the Voyeur Dorm were "all being exploited" and "all encouraged to take their clothes off;" that there were numerous visits by the media to the premises including reporters and camera crews;[6] and there was an Incident Report prepared by the Tampa Police Department reflecting an alleged battery that occurred at the premises. Moreover, Plaintiffs' own criminologist testified at his deposition that there was an 11.2% increase in calls for service to the Tampa Police Department in the area of the premises after the Voyeur Dorm began its operation at the premises; and Plaintiffs' criminologist was unable to definitively rule out the

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may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

[6] Plaintiff Autumn Marenger testified that there were approximately 20 different occasions when the media visited the premises when she was present and that typically there was a reporter and a camera person present in connection with the visits by the media; and another former employee at the premises testified that she was interviewed at the premises approximately 30 times by the media.

possibility that the Voyeur Dorm caused the increase in calls for service to the Tampa Police Department.[7]

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[7] Notwithstanding the aforesaid evidence which is indicative of adverse secondary effects from the adult entertainment being staged and filmed at the residential premises, it is the Plaintiffs' position – based upon reports prepared by Plaintiffs' alleged experts – that there are no adverse secondary effects from the adult entertainment being staged and filmed at the premises. In that regard, to the extent that it were necessary to demonstrate adverse secondary effects on a case by case basis, a trial may be necessary to resolve any factual dispute between the parties as to whether there are adverse secondary effects in the residential neighborhood from the adult entertainment being staged and filmed on the residential premises. As set forth *supra*, however, the Supreme Court has held that a city need not conduct new studies on a case by case basis to demonstrate the problem of secondary effects associated with the presence of even one adult entertainment establishment in a given neighborhood. *Pap's*, 529 U.S. at 296-297. Similarly, in *Cafe 207, Inc. v. St. John's County*, 856 F.Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996), where "Plaintiff vigorously argue[d] that a trial [was] necessary to explore and decide fact issues relating to . . . whether there are, in actuality, any adverse secondary effects of adult entertainment establishments," the court expressly rejected the plaintiff's argument. *Id.* at 644. The court stated in relevant part that "[e]vidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Id.* at 645. Accordingly, the District Court in the case *sub judice* properly concluded that "Plaintiffs' expert reports regarding the secondary effects of the subject premises, or lack thereof, are irrelevant to this Court's analysis, and there is no merit to Plaintiffs' argument that there are no *actual* secondary effects from the activities at the premises." (See App. 22-23) (emphasis in original).

The decision by the Eleventh Circuit, which countenances adult entertainment being staged and filmed at a residential premises 24 hours a day, 7 days a week, clearly flies in the face of well established case law which allows municipalities to protect the quality of residential neighborhoods. Indeed, in *City of Renton*, the Supreme Court expressly held that in the context of zoning adult uses that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " 475 U.S. at 50 (quoting *American Mini Theatres*, 427 U.S. at 71). Moreover, the Supreme Court has held that "[T]he police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).[8]

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[8] The Supreme Court's decision in *Village of Belle Terre* has subsequently been cited with favor in numerous cases including *Farrell v. City of Miami*, 587 F.Supp. 413 (S.D. Fla. 1984), *aff'd*, 758 F.2d 658 (11th Cir. 1985) wherein the court upheld the validity of an ordinance limiting the commercial use of a residentially zoned property. In *Farrell*, the court made clear that an ordinance which seeks to protect residential neighborhoods by limiting commercial uses of a house has been recognized as a proper restriction on the use of residential property. The Supreme Court's decision in *Village of Belle Terre* has also been favorably quoted in *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1992), *cert. denied*, 511 U.S. 1018 (1994) wherein the Eleventh Circuit stated that the "Supreme Court has held restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion.' " 997 F.2d at 1375 (quoting *Village of Belle Terre*, 416 U.S. at 9).

Finally, it must be noted that the City is *not* regulating the content of speech or any other form of communication that is being disseminated over the internet; rather, the City is simply seeking to regulate the *location*[9] of an adult use business. This distinction has been recognized by the Supreme Court in a number of cases including *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) wherein the Supreme Court observed that "In *Renton*, we upheld a zoning ordinance that kept adult movie theatres *out of residential neighborhoods*. The ordinance was aimed, not at the content of the films . . . but rather at the 'secondary effects' . . . *'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech.'* " *Reno*, 521 U.S. at 867 (emphasis supplied) (quoting *Renton*, 475 U.S. at 49) (quoting *American Mini Theatres*, 427 U.S. at 71 n.34).

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[9] Plaintiffs may stage and film adult entertainment in other locations throughout the City that are properly zoned for adult entertainment. In that regard, adult uses are permitted in the CI, IG and IH districts within the City. (See App. 17 n.2.)

B. THE DECISION OF THE ELEVENTH CIRCUIT, WHICH READS LANGUAGE INTO THE CITY CODE'S DEFINITION OF AN ADULT ENTERTAINMENT ESTABLISHMENT TO REQUIRE THAT PATRONS VIEW THE ADULT ENTERTAINMENT FROM THE LOCATION WHERE THE ADULT ENTERTAINMENT IS BEING STAGED AND FILMED, IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

As the District Court stated in its November 6, 2000 Order, "There is no language in the City Code that expressly states a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment." (See App. 18) (emphasis in original).

The Eleventh Circuit itself appears to acknowledge in its opinion that a literal reading of § 27-523 of the City Code does not require that the paying public be on the premises. In that regard, the Eleventh Circuit states in its opinion that "the district court read Section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*. . . . " (See App. 10) (emphasis in original).

The City respectfully submits that given the literal language of § 27-523 of the City Code, which does not expressly require that patrons view the adult entertainment from the location where the adult entertainment is being staged and filmed, it is improper for the Eleventh Circuit to read language into the ordinance which does not appear on the face of the ordinance. In that regard,

the law is well established that the plain meaning of a statute or ordinance is the polestar of statutory construction. Indeed, in *Hughes Aircraft Company v. Jacobson*, 522 U.S. 432, 438 (1999), the Supreme Court unanimously held that "As in any case of statutory construction, our analysis begins with 'the language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well."

Finally, even assuming arguendo that § 27-523 of the City Code were ambiguous and susceptible of two interpretations, the Supreme Court has held that an agency's interpretation of a statute "need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). In that regard, the District Court properly found that the Zoning Coordinator's determination was not clearly erroneous and that, as a matter of law, "an agency's interpretation of a statute that is charged with enforcing it is entitled to great weight and deference." (See App. 20.)

CONCLUSION

The questions presented herein are of exceptional importance and go to the very essence of this Court's jurisprudence permitting municipalities to regulate the location of adult entertainment businesses. In that regard, this Court has consistently shown deference to the efforts of municipalities to ameliorate the adverse secondary effects of adult businesses on neighborhoods through the use of the zoning power.

The questions presented herein are also of significance because of the advent of the internet and its use by the Plaintiffs to commercially transmit adult entertainment from a residential home, where the adult entertainment is being staged and filmed, to subscribers who pay a monthly fee to watch the adult entertainment. In that regard, the technological development of the internet – and the ability of patrons to view the adult entertainment through the internet without physically attending the residential premises wherein the adult entertainment is being staged and filmed – should not undermine, or make inapplicable, the well established case law of this Court which allows municipalities to keep adult entertainment establishments out of residential neighborhoods.

In conclusion, this case is of national significance and the failure of this Court to address the questions set forth herein may result in the proliferation of adult entertainment establishments – staging and filming adult entertainment 24 hours a day – in residential neighborhoods throughout the country and thereby creating adverse secondary effects in the residential neighborhoods where the adult entertainment is being staged and filmed.

Accordingly, it is respectfully requested that this Court grant the within Petition and resolve the vital questions which are the subject of the within Petition.

DATED: December 14, 2001

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-16346

D.C. Docket No. 99-02180-CV-T-24F

VOYEUR DORM, L.C., a Florida limited liability company, ENTERTAINMENT NETWORK, INC., a Florida corporation, et al.,

Plaintiffs-Appellants,

DAN MARSHLACK, SHARON GOLD MARSHLACK,

Plaintiffs,

versus

CITY OF TAMPA, FL, a Florida municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(September 21, 2001)

Before TJOFLAT, DUBINA and DUHE*, Circuit Judges.

DUBINA, Circuit Judge:

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* Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

This appeal arises from Voyeur Dorm L.C.'s ("Voyeur Dorm") alleged violation of Tampa's City Code based on the district court's characterization of Voyeur Dorm as an adult entertainment facility. Because we conclude the district court misapplied Tampa's City Code because it erroneously found that Voyeur Dorm offered adult entertainment to the public at the residence in question, we reverse the judgment of the district court.

I. BACKGROUND

As alleged in its complaint, Voyeur Dorm is a Florida limited liability company that maintains offices and conducts its business in Hillsborough County, Florida. Voyeur Dorm operates an internet based web site that provides a 24 hour a day internet transmission portraying the lives of the residents of 2312 West Farwell Drive, Tampa, Florida. Throughout its existence, Voyeur Dorm has employed 25 to 30 different women, most of whom entered into a contract that specifies, among other things, that they are "employees," on a "stage and filming location," with "no reasonable expectation of privacy," for "entertainment purposes." Subscribers to "voyeurdorm.com" pay a subscription fee of $34.95 a month to watch the women employed at the premises and pay an added fee of $16.00 per month to "chat" with the women. From August 1998 to June 2000, Voyeur Dorm generated subscriptions and sales totaling $3,166,551.35.

In 1998, Voyeur Dorm learned that local law enforcement agencies had initiated an investigation into its business. In response, counsel for Voyeur Dorm sent a letter

to Tampa's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive. In February of 1999, Tampa's Zoning Coordinator, Gloria Moreda, replied to counsel's request and issued her interpretation of the City Code, concluding in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premises.
>
> 2. 30 Internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower and kitchen.
>
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
>
> 4. The web page address is *http://www.voyeurdorm.com/*
>
> 5. The web page shows various scenes from the house, including a woman with exposed buttocks. Statements on the page describe activities that can be viewed such as "the girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion."
>
> The web page can be found by going to Yahoo! and entering "Voyeurdorm" on the search. The name of the website is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as "A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point."

> It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as: "Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances distinguished by their display or depiction of specified anatomical areas or specified anatomical activities, as defined in this section."
>
> Please be aware that the property is zoned RS-60 Residential Single Family, and an adult use business is not permitted use. You should advise your client to cease operation at that location.

Thereafter, in April of 1999, Dan and Sharon Gold Marshlack[1] appealed the Zoning Coordinator's decision to Tampa's Variance Review Board. On or about July 13, 1999, the Variance Review Board conducted a hearing. At the hearing, Voyeur Dorm's counsel conceded the following: that five women live in the house; that there are cameras in the corners of all the rooms of the house; that

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[1] Mr. and Mrs. Marshlack are the owners of the real property located at 2312 West Farwell Drive. They lease the subject property to Voyeur Dorm.

for a fee a person can join a membership to a web site wherein a member can view the women 24 hours a day, seven days a week; that a member, at times, can see someone disrobed; that the women receive free room and board; that the women are part of a business enterprise; and that the women are paid. At the conclusion of the hearing, the Variance Review Board unanimously upheld the Zoning Coordinator's determination that the use occurring at 2312 West Farwell Drive was an adult use. Subsequently, Mr. and Mrs. Marshlack filed an appeal from the decision of the Variance Review Board to the City Council. The Tampa City Council held a hearing in August of 1999, at the conclusion of which the City Council unanimously affirmed the decision of the Variance Review Board.

Voyeur Dorm filed this action in the middle district of Florida. The City of Tampa and Voyeur Dorm then filed cross-motions for summary judgment. The district court granted Tampa's motion for summary judgment, from which Voyeur Dorm now appeals.

II. ISSUES

1. Whether the district court properly determined that the alleged activities occurring at 2312 West Farwell Drive constitute a public offering of adult entertainment as contemplated by Tampa's zoning restrictions.

2. Whether the district court properly relied on the negative secondary effects doctrine in determining the constitutionality of Tampa's zoning restrictions as applied to 2312 West Farwell Drive.

3. Whether the predicate evidence that Tampa relied upon to adopt its adult use restrictions must contemplate internet forms of communication in order to restrict internet forms of communication.

III. STANDARD OF REVIEW

This court reviews the district court's grant of a motion for summary judgment *de novo*, applying the same legal standards used by the district court. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 995 (11th Cir. 1998).

IV. DISCUSSION

The threshold inquiry is whether section 27-523 of Tampa's City Code applies to the alleged activities occurring at 2312 West Farwell Drive. Because of the way we answer that inquiry, it will not be necessary for us to analyze the thorny constitutional issues presented in this case.

Section 27-523 defines adult entertainment establishments as

> [a]ny premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; "entertainment" as used in this definition shall

> include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Tampa argues that Voyeur Dorm is an adult use business pursuant to the express and unambiguous language of section 27-523 and, as such, cannot operate in a residential neighborhood. In that regard, Tampa points out: that members of the public pay to watch women employed on the premises; that the Employment Agreement refers to the premises as "a stage and filming location"; that certain anatomical areas and sexual activities are displayed for entertainment; and that the entertainers are paid accordingly. Most importantly, Tampa asserts that nothing in the City Code limits its applicability to premises where the adult entertainment is actually consumed.

In accord with Tampa's arguments, the district court specifically determined that the "plain and unambiguous language of the City Code . . . does not expressly state a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment." *Voyeur Dorm, L.C., et al., v. City of Tampa,* No. 99-2180 (M.D. Fla. Nov. 6, 2000) (order granting summary judgment to Tampa). While the public does not congregate to a specific edifice or location in order to enjoy the entertainment provided by Voyeur Dorm, the district court found 2312 West Farwell Drive to be "a premises on

which is offered to members of the public for consideration entertainment featuring specified sexual activities within the plain meaning of the City Code." *Id.*

Moreover, the district court relied on Supreme Court and Eleventh Circuit precedent that trumpets a city's entitlement to protect and improve the quality of residential neighborhoods. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' ") (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996-97 (11th Cir. 1998) (noting that it is well established that the regulation of public health, safety, and morals is a valid and substantial state interest); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (noting that the "Supreme Court has held [that] restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion' ") (internal citations omitted).

In opposition, Voyeur Dorm argues that it is not an adult use business. Specifically, Voyeur Dorm contends that section 27-523 applies to locations or premises wherein adult entertainment is actually offered to the public. Because the public does not, indeed cannot, physically attend 2312 West Farwell Drive to enjoy the adult entertainment, 2312 West Farwell Drive does not fall within the purview of Tampa's zoning ordinance. We agree with this argument.

The residence of 2312 West Farwell Drive provides no "offer[ing] [of adult entertainment] to members of the public." The offering occurs when the videotaped images

are dispersed over the internet and into the public eye for consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations. Residential areas are often cordoned off from business districts in order to promote a State's interest. *See, e.g., City of Renton,* 475 U.S. at 50 ("A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa and the district court concerns adult entertainment in which customers *physically attend* the premises wherein the entertainment is performed.[2] Here, the audience or

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[2] The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse effects that debase adjacent properties. *See, e.g., City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000) (relying on the negative secondary effects doctrine to uphold a city's ordinance as applied to an erotic dancing establishment); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult motion picture theaters from operating in certain locations based upon the negative secondary effects created by such theaters); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Flanigan's Enterprises, Inc. v. Fulton County,* 242 F.3d 976 (11th Cir. 2001) (holding that a local ordinance failed to further the county's purported concern with negative secondary effects and was thus unconstitutionally applied); *Ward v. County of Orange,* 217 F.3d 1350 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993 (11th Cir. 1998); *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir. 1985).

consumers of the adult entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space."[3] While the district court read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment. Accordingly, because the district court misapplied section 27-523 to the residence of 2312 West Farwell Drive, we reverse the district court's order granting summary judgment to Tampa. Since the resolution of this threshold issue obviates the need for further analysis, we do not reach the remaining issues regarding the constitutionality of Tampa's zoning restrictions as applied to Voyeur Dorm.

REVERSED.

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[3] *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (stating that internet communication is "a unique medium – known to its users as 'cyberspace' – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet").

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VOYEUR DORM, L.C.,
et al.,

Plaintiffs,

vs. Case No. 8:99-cv-2180-T-24F

THE CITY OF TAMPA,
FLORIDA,

Defendant.
_____/

ORDER

This cause comes before the Court for consideration of Defendant's Motion for Final Summary Judgment (Doc. No. 49, filed July 31, 2000) and Plaintiffs' Dispositive Motion for Summary Judgment (Doc. No. 66, filed July 31, 2000). Each party filed a response in opposition to opposing party's motion for summary judgment (Doc. Nos. 75 & 72, respectively).

Factual Background

On January 29, 1999, Plaintiffs' counsel, Mark Dolan, sent a letter to the City's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive, Tampa, Florida ("the premises").

On February 12, 1999, the City's Zoning Coordinator, Gloria Moreda, responded to the aforesaid letter and stated in relevant part:

The following generally describes the activities occurring on the property:

1. 5 unrelated women are residing on the premise.
2. 30 internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower, & kitchen.
3. For a fee, internet viewers are able to monitor the activities in the different rooms.
4. The web page address is *http://www.voyeurdorm.com/*
5. The web page shows various scenes from the house, including a woman with exposed buttocks. Statements on the page describe activities that can be viewed such as 'The Girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion'.

The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The name of the web site is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as 'A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point'.

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as:

> Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.
>
> Please be aware that the property is zoned RS-60 Residential Single Family and an adult use business is not a permitted use. You should advise your client to cease operation at that location.

Thereafter, on or about April 12, 1999, Dan and Sharon Gold Marshlack[1] appealed the Zoning Coordinator's decision to the City's Variance Review Board. According to the Statement of Administrative Appeal filed by Mr. and Mrs. Marshlack, the section of the City Code which was appealed was "Section 27-523 as interpreted by Gloria Moreda, Zoning [Coordinator], in her letter of February 12, 1999."

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[1] Mr. and Mrs. Marshlack are the owners of the real property located at 2312 West Farwell Drive. They lease the subject property to Voyeur Dorm, L.C.

Thereafter, on or about July 13, 1999, an appellate hearing was held before the City's Variance Review Board. At the conclusion of the hearing, the Variance Review Board voted unanimously to uphold the Zoning Coordinator's determination in this matter that the use occurring at 2312 West Farwell Drive is an adult use.

Thereafter, on or about July 18, 1999, Mr. and Mrs. Marshlack filed an appeal from the decision of the Variance Review Board to the City Council. Then, on or about August 26, 1999, an appellate hearing was held before Tampa City Council in this matter. At the conclusion of the hearing, City Council voted unanimously to affirm the decision of the Variance Review Board, which had upheld the determination of the Zoning Coordinator.

Thereafter, this action was filed in this Court by Plaintiffs on September 24, 1999. Each party now moves for summary judgment in their favor.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). When the party moving for the summary judgment bears the burden of persuasion on

the issue at trial, its showing must sustain the burden as well as demonstrate the absence of a genuine dispute. *See Celotex Corp.*, 477 U.S. at 331-32. Therefore, the moving party must satisfy both the initial burden of production on the summary judgment motion, by showing that no genuine dispute exists as to any material fact, and the ultimate burden of persuasion on the claim, by showing that it would be entitled to a directed verdict at trial. When the party moving for the summary judgment does not bear the burden of persuasion on the issue at trial, the moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989); *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron & Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

Discussion

There is no dispute that the *website* for Voyeur Dorm involves an adult entertainment business. The two main disputed issues in this action are: (1) whether Plaintiffs

use of the premises satisfies all the elements of the definition of an adult use in Section 27-523; and (2) whether the record used to support the adoption of Section 27-523 is sufficient to satisfy constitutional standards in that it did not contemplate Internet-based forms of communication.[2]

As to the first issue, Plaintiffs argue that their use of the premises does not satisfy all the elements of the definition of an adult use because it is not a premises "*on which* is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities. . . . " (emphasis added). Plaintiffs argue that no member of the public was ever offered for a consideration any adult entertainment *on* the premises. Instead, the viewing of the activities of the residents by the members of the public "takes place in virtual space, via a global computer network comprised of computer servers primarily located in a office building in downtown Tampa and on other computer servers located throughout the world. Any actual viewing of any computer rendered digital images of the residents takes

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[2] It is undisputed that the premises is located in a district zoned RS-60 Residential Single Family. Under the City Code, adult uses are not permitted in a district zoned RS-60 Residential Single Family, and, in fact, are expressly prohibited in a residential district zoned RS-60. Adult uses are permitted only in the CI, IG and IH districts. Moreover, in order to obtain approval of an S-1 permit for an adult use in the CI, IG and IH districts, it is necessary for the applicant to satisfy the specific standards set forth under § 27-272 for an adult use including the distance separation requirement that "[n]o adult use shall be located within five hundred (500) feet of any residential or office district." Section 27-272 of the City Code.

place in the homes and offices of subscribers to the Voyeur Dorm web site." Affidavit of David G. Marshlack, ¶ 10. Accordingly, Plaintiffs contend that their use of the premises does not constitute an adult use.

It is well established that the plain meaning of a statute or ordinance is the polestar of statutory construction. In *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999), the United States Supreme Court unanimously held that "As in any case of statutory construction, our analysis begins with the 'language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well."

Similarly, the Eleventh Circuit held that " 'In construing a statute we must begin, and often should end as well, with the language of the statute itself.' " *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997)), *cert. denied*, 120 S. Ct. 335 (1999).

Accordingly, this Court must apply the plain and unambiguous language of the City Code and may not read language into it that does not appear on its face. There is no language in the City Code that expressly states a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment. The plain language of the City Code includes any premises "on which is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities. . . . " The premises at 2312 West Farwell Drive is clearly a premises on which is offered to members of

the public for consideration entertainment featuring specified sexual activities under the plain meaning of the City Code. To construe the City Code otherwise would require that this Court read language into the City Code requiring that the members of the public be present at the premises.

This Court also takes into consideration that, as a matter of zoning law, the City is entitled to protect and improve the quality of residential neighborhoods. Indeed, the Eleventh Circuit has noted that the "Supreme Court has held restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion.' " *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)[3]), *cert. denied*, 511 U.S. 1018 (1994).

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[3] In *Village of Belle Terre v. Boraas*, where the Supreme Court upheld the constitutional validity of an ordinance which prohibited more than two unrelated persons from living in the same dwelling, the Court stated that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Boraas*, 416 U.S. at 9. The Supreme Court's decision in *Boraas* has subsequently been cited with favor in numerous cases including, but not limited to, *Farrell v. City of Miami*, 587 F. Supp. 413, 416 (S.D. Fla. 1984) (wherein the court upheld the validity of an ordinance limiting the commercial use of a residentially zoned property), *aff'd*, 758 F.2d 658 (11th Cir. 1985). In *Farrell*, the court made clear that an ordinance which seeks to protect residential neighborhoods by limiting commercial uses of a house has been recognized as a proper restriction on the use of residential property.

In addition, the Court notes that the law is well established that an agency's interpretation of a statute that is charged with enforcing it is entitled to great weight and deference. In fact, a reviewing court may not overturn an agency's interpretation of a statute that is charged with administering a statute unless the agency's interpretation is clearly erroneous. *See Department of Health & Rehabilitative Serv. v. A.S.*, 648 So.2d 128, 132 (Fla. 1995); *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988).

> When an agency with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible. Since [the city's] interpretation was entitled to such great weight and was not shown to be clearly erroneous, the trial court erred by not accepting the city's interpretation. . . .

Seibert v. Bayport Beach & Tennis Club Ass'n, 573 So.2d 889, 892 (Fla. 2d DCA 1990) (citations omitted), *rev. denied*, 583 So.2d 1034 (Fla. 1991). This Court cannot find that the Zoning Coordinator's determination was clearly erroneous.

The second issue before this Court is the Plaintiffs' argument that there was an improper predicate for the adoption of the City's adult use ordinance and/or that there are no secondary effects created by the premises in question.

It is well established that the regulation of adult entertainment businesses has to serve a legitimate governmental interest such as the prevention of adverse secondary effects caused by the adult entertainment

establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Plaintiffs argue that there is significant doubt as to the validity of the City's record, particularly as it relates to any Internet-based "e-commerce" form of communication, because there is no possible way that the characteristics of this form of communication could have been considered at the time the City of Tampa considered the record upon which it relied in adopting the adult use ordinance. Plaintiffs further argue that there is no evidence of secondary effects occurring at 2312 West Farwell Drive.

The Eleventh Circuit has held that the evidence of *actual* adverse secondary effects was of no moment. *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992). "[Plaintiff] further argues that there is uncontradicted evidence in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually increased at a higher rate than before the opening of Thee Dollhouse III. *This argument hold no weight." Id.* at 1163 (emphasis added).

Similarly, in *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992), the court held that the County of Pinellas was not required to actually experience adverse secondary effects from adult use establishments prior to enacting an ordinance restricting the location of such adult use establishments. The court held in relevant part:

> Plaintiffs contend that . . . the county failed to recognize evidence which rebutted the existence

> of such adverse secondary effects. This argument fails under *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). In *International Eateries*, the plaintiff failed to invalidate distance ordinances even where uncontradicted evidence existed that the [adult use establishments] had not in fact caused any adverse effects on surrounding property values and that the property values had actually increased at a higher rate than before the opening of the [adult use establishments]. *Id.* at 1163. Thus, this Court adopts the finding that the County is not required to actually experience the secondary effects prior to enacting the ordinance. Rather, the County may rely on the secondary effects suffered by other cities.

T-Marc, 804 F. Supp. at 1503-04 (citations omitted).

Similarly, in *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996), where "Plaintiff vigorously argue[d] that a trial [was] necessary to explore and decide fact issues relating to . . . whether there are, in actuality, any adverse secondary effects of adult entertainment establishments," the court expressly rejected the plaintiff's argument. *Id.* at 644. The court stated in relevant part that "[e]vidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Id.* at 645. Accordingly, the Plaintiffs' expert reports regarding the secondary effects of the subject premises, or lack thereof, are irrelevant to this Court's analysis, and there is no merit to Plaintiffs' argument that

there are no *actual* secondary effects from the activities at the premises.

As for the issue of whether the predicate for the adoption of the adult use ordinance was proper or not, as it relates to any Internet-based "e-commerce" form of communication, because it could not have specifically taken into consideration the characteristics of this form of business at the time the adult use ordinance was adopted, the following case law is instructive. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 120 S. Ct. 1553 (2000), the Eleventh Circuit, quoting *Cafe 207*, stated:

> "It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes*[4]] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law."

Sammy's, 140 F.3d at 997 n. 6 (quoting *Cafe 207*, 856 F.Supp. at 645).

The Supreme Court in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), has also discussed the appropriateness of a court giving the lawmakers leeway in justifying a law based on secondary effects.

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[4] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

> [T]he government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien*[5] is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them." 391 U.S., at 378-380, 88 S.Ct. 1673. There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness is a case involving actual regulation of First Amendment expression.[6] As we have said, so long as the regulation is unrelated to the suppression of

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[5] *United States v. O'Brien*, 391 U.S. 367 (1968).

[6] This case is clearly one in which conduct is being regulated, not First Amendment expression. The adult use ordinance does not attempt to regulate the primary effects of expression, i.e., the effect on the audience of watching adult entertainment, but rather the secondary effects, such as the impacts on public health, safety, and welfare. *See City of Erie*, 120 S. Ct. at 1392; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986).

> expression, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S., at 406, 109 S. Ct. 2533. *See, e.g., United States v. O'Brien, supra*, at 377, 88 S. Ct. 1673; *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non-Violence*, 468 U.S., at 299, 104 S. Ct. 3065 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

City of Erie, 120 S. Ct. at 1396; *see also Ward v. County of Orange*, 217 F.3d 1350, 1353 (11th Cir. 2000) (citing *City of Erie* with favor).

"[I]t is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment." *City of Erie*, 120 S. Ct. at 1395.

Based on this case law, there can be no finding that there was an improper predicate for the adoption of the City's adult use ordinance simply because the lawmakers could not have considered the specific characteristics of Internet-based e-commerce at the time of the adoption of the adult use ordinance. Even though the studies relied upon did not evaluate the secondary effects of Internet-based "e-commerce" adult entertainment businesses, the studies did evaluate secondary effects that are similarly

applicable to an adult entertainment business connected to its customers via the Internet. The City need not prove that Plaintiffs' business would likely have the exact same adverse effects on its surroundings as the adult businesses previously studied. So long as the adult use ordinance affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, the City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. *American Mini Theatres,* 427 U.S. at 71; *ILQ Inv., Inc. v. City of Rochester,* 25 F.3d 1413, 1418 (8th Cir.), *cert. denied,* 513 U.S. 1017 (1994).

The Supreme Court has held that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses serves a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50 (1986). The Supreme Court also held that a city is not required to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. *Id.* at 53.

"[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *City of Renton,* 475 U.S. at 50 (quoting *American Mini Theatres,* 427 U.S. at 71). It is well established that the regulation of public health, safety and morals is a valid and substantial state interest. *Sammy's,* 140 F.3d at 996-97. This Court finds that the City had a reasonable basis for believing that its adult use ordinance would

serve its substantial governmental interest and that substantial governmental interest is applicable to the adult use occurring at 2312 West Farwell Drive.[7]

Because this Court finds that the activities occurring at 2312 West Farwell Drive constitute an adult use pursuant to the City Code and that the City Code is based upon a proper predicate and is justified based on secondary effects, the remaining claims raised by Plaintiffs' complaint are meritless.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Final Summary Judgment (Doc. No. 49) is **GRANTED.** Defendant's request for attorney's fees is **DENIED.** The Clerk is directed to enter judgment in favor of the Defendant and **CLOSE** this case.

DONE AND ORDERED at Tampa, Florida, this 6th day of November, 2000.

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[7] This Court, in *Specialty Malls of Tampa v. City of Tampa*, 916 F. Supp. 1222 (M.D. Fla. 1996), *aff'd*, 109 F.3d 770 (11th Cir. 1997), wherein plaintiffs' counsel also argued that there was an improper predicate for the adoption of the adult use ordinance, expressly rejected this argument and granted the City's motion for summary judgment stating:

> The Court finds that the City of Tampa laid a proper predicate for adoption of the Ordinance. The Ordinance notes that the locational criteria pertaining to adult uses "was initially adopted based on studies presented at previous public hearings demonstrating such uses have deleterious effects on adjacent property. . . ."

Id. at 1230.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to Counsel of Record